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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 707

AMBROSIA CHOCOLATE COMPANY,
Petitioner,

vs.

AMBROSIA CAKE BAKERY, INC.,
Respondent.

REPLY BRIEF FOR PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1. CONCERNING RESPONDENT'S STATEMENT OF THE CASE.

While respondent correctly states that there were other registrations than those of the petitioner of the trade-mark *Ambrosia* in Patent Office Class 46, Foods and ingredients of foods, the only existing and valid registrations in that class at the time this suit was commenced were those of the petitioner, and the District Court so found. (R 9, Finding of Fact No. 9)

Respondent says at page 2 that petitioner's registrations "covered only the very limited articles of chocolate and chocolate products, in Class 46." Respondent then goes on to repeat certain language from the opinion of the

District Court which reflects a theory that a trade-mark registration in the Patent Office is similar to a patent in that it covers only those items which are specifically enumerated or "claimed" therein. This is obviously erroneous since a trade-mark registrant is entitled to protection not only for those goods upon which he actually uses the mark (and for which it is registered) but the statute expressly provides that its use is also to be protected upon "merchandise of substantially the same descriptive properties as those set forth in the registration." 15 U.S.C. § 96.

Respondent, at page 3, also repeats the error of the District Court and the Circuit Court of Appeals in insisting that because there was no showing of actual competition between the parties or of actual confusion as to their products, petitioner was not entitled to an injunction. The mere parroting of the holdings of the lower courts on this point does not answer petitioner's contention (supported by numerous cases at pp. 14-16 of petitioner's main brief) that it is necessary only to show a *likelihood* of consumer confusion as to the source of the products of the parties in order to warrant a decree of injunction in a technical trade-mark infringement case.

In this connection it is to be noted that the testimony reproduced on p. 3 of respondent's brief comprises lengthy questions propounded on cross-examination. That one of petitioner's officers had received no complaints of consumer confusion does not prove that such confusion never existed.

II. CONCERNING RESPONDENT'S ARGUMENT

1. Petitioner Does Not Seek Merely to Have the Evidence Reviewed.

Under the heading "Writ of Certiorari should not be granted merely to review the evidence" respondent has restated certain of the findings of the courts below as to the legal effect of the evidence in the case. Respondent then cites *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178, 58 S. Ct. 849, 851 to the effect that the question of acquiescence and estoppel "depends upon the facts", and says that on this basis there is no warrant for a review of the instant case. But the General Talking Pictures case had to do with patent infringement, and it will be seen by reference to the facts (see 91 F. (2d) 922 @ 929) that the parties there were in dispute over the facts but substantially agreed as to the law, once the facts were established.

The situation is exactly reversed here. The parties are in substantial agreement as to the facts. But they disagree as to the legal conclusion to be drawn from the facts, and their cleavage is along the lines of a basic disharmony between the Fourth Circuit and other circuits, particularly the Second. For the facts in this case are identical with those of the Aunt Jemima case of the Second Circuit (247 Fed. 407, see p. 20 of petitioner's main brief), yet the two courts arrived at diametrically opposite conclusions.

Thus this Court is not asked to review evidence. It is called upon to resolve a fundamental disharmony in the law of trade-marks.

2. Conflict in Decisions.

Under the heading "No conflict exists in the decisions" (p. 7 of respondent's brief) respondent states that there is no disharmony between the decisions cited by petitioner and that of the Circuit Court of Appeals for the Fourth Circuit in this case. Respondent insists that the cases are distinguishable, but its only argument on this point is that "The Fourth Circuit noted that 'in the Aunt Jemima case, there was no active encouragement to the defendant to use the trade-mark in question,' and the additional fact that there was actual confusion in that case."

The mere repetition of the erroneous holdings and findings of the courts below does not answer the arguments put forth by petitioner in its brief in support of the petition showing that those holdings and findings are completely out of harmony with the courts of other circuits in similar factual situations.

3. Other Points in Respondent's Brief.

The remaining arguments in respondent's brief are dealt with in petitioner's main brief. Respondent, in urging that no important question of trade-mark law is here presented, again repeats its argument that the goods of the parties are not competitive and that no actual confusion is indicated by the evidence. Mere repetition of this erroneous reasoning does not comprise an argument in support thereof.

In arguing that the District Court did not depart from the accepted and usual course of judicial proceedings, respondent says that the first seven Findings of Fact of the District Court were adopted verbatim from petitioner's requested findings of fact. These findings con-

cern merely formal matters such as the identity of the parties. All of the material findings, upon which the entire decision hinged, were adopted from respondent's proposed findings of fact as stated at p. 22 of petitioner's main brief, and these findings besides being contrary to the evidence in many respects, are in a form which the courts have repeatedly condemned as "delayed, argumentative, over-detailed documents prepared by winning counsel after the event * * *" *Matton Oil Transfer Corp. v. The Dynamic,* 123 F. (2d) 999 @ 1001 (C.C.A.-2, 1941). Merely to argue that the District Court erred in petitioner's favor in some immaterial respects does not derogate from the prejudice resulting from its improper procedure in arriving at the material findings.

Nor does respondent say anything about the significant fact that the District Court's opinion and Findings of Fact were prepared before the transcript of the record and of the several depositions were available to it, but more than 50 days after the conclusion of the trial. Respondent answers (p. 12) that the opinion and findings were in proper *form*. But the opinion and findings arrived at under the circumstances above recited are no less prejudicial to petitioner because the *form* in which they are presented complies with the rules.

CONCLUSION

Respondent's brief in opposition to the petition for Write of Certiorari in no wise answers the arguments put forth in petitioner's main brief. In general respondent merely repeats the findings and holdings of the courts below and does not show that those findings and holdings are correct or consistent with the holdings of other circuits.

It is respectfully submitted that a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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